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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/568,044	08/18/2006	Michel Arnould	VANM199.003APC	2566
29995 7590 06/29/2009 KNOBBE MARTENS OLSON & BEAR LLP 2040 MAIN STREET FOURTEENTH FLOOR IRVINE, CA 92614				
EXAMINER				
SMITH, PRESTON				
ART UNIT		PAPER NUMBER		
1794				
NOTIFICATION DATE		DELIVERY MODE		
06/29/2009		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

jcartee@kmob.com  
eOAPilot@kmob.com

### Office Action Summary

**Application No.**

10/568,044

**Applicant(s)**

ARNOULD ET AL.

**Examiner**

PRESTON SMITH

**Art Unit**

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 24 March 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 23, 25-32 and 35-42 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 23, 25-32 and 35-42 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 13 February 2006 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

**Claims 23, 25-26, 28, 30-32, 37-38, and 41 rejected under 35 U.S.C. 103(a) as being unpatentable over Murllo Hadad Pires, US-PGPub 2002/0119238 in view of Proceedings of World Conference on Lauric oils NPL as evidenced by Jim Doucet, US-Patent 5,908,655.**

**Regarding claim 23, 36, and 41,** Pires teaches a creamy, milk free oil in water emulsion comprising hydrocolloids and emulsifier(abstract) which is protein free

(paragraph 0003. It overcomes the prior art limitations as mentioned in 0007 which includes the limitation of having to contain protein. Additionally all of the tables from listed from 0051-0056 describe embodiments containing no protein). The oils (such as palm kernel oil which is a vegetable oil) may be present in an amount of 10-40% (0028). The pre emulsion may be treated with UHT (0052) (the resulting emulsion is considered to be equivalent to applicant's UHT treated emulsion since the UHT sterilization of the pre emulsion of Pires would still be sterile after the cooling stage which would result in the formation of the "post" emulsion).

Pires fails to teach a hydrogenated fat.

Proceedings of World Conference on Lauric oils NPL teaches that it is well known in the art to use hydrogenated palm kernel oils in the formation of whipped topping products, fillers, etc. (see Proceedings of World Conference on Lauric oils NPL). It would have been obvious to one having ordinary skill in the art at the time of the invention to use the fat of Proceedings of World Conference on Lauric oils NPL with the invention of Pires (in the creation of a whipped topping or fillers, see 0010 and 0049 of Pires) since hydrogenated palm kernel oils impart easy air incorporation properties during whipping (in the production of Whipped toppings) and give high solid content required for foam stiffness and are more resistant to the development of off flavors due to oxidation (see Proceedings of World Conference on Lauric oils NPL.). Additionally, fully hydrogenated palm kernel oil have trans fatty acid contents typically less than 1% (column 9, lines 21-25 of Doucet).

**Regarding claim 25**, Pires teaches that the emulsifier may be polysorbat 60 or lechitins and may be present in an amount of 0.1-5% (0029).

**Regarding claim 26 and 37-38**, Pires teaches that the hydrocolloid may be present in an amount of 0.1-3% and may be guar gum (0026).

**Regarding claim 28**, Pires teaches whipping (paragraph 0046).

**Regarding claim 30**, Pires teaches that the product can be used as a topping (0049).

**Regarding claim 31-32**, the whipped product of Pires can be used as a topping to decorate cakes (0048-0049).

**Claim 35 rejected under 35 U.S.C. 103(a) as being unpatentable over Murillo Hadad Pires, US-PGPub 2002/0119238 in view of Proceedings of World Conference on Lauric oils NPL as evidenced by Jim Doucet, US-Patent 5,908,655 and David M. King, US-Patent 4,876,107.**

**Regarding claim 35**, Pires teaches palm kernel oil which is a fat of lauric origin (see column 6, line 52 of King).

**Claims 27 rejected under 35 U.S.C. 103(a) as being unpatentable over Murillo Hadad Pires, US-PG Pub 2002/0119238 in view of Proceedings of World Conference on Lauric oils NPL and Richard Robert Leshik, US-Patent 6,117,473 as evidenced by Jim Doucet, US-Patent 5,908,655.**

**Regarding claim 27**, the composite invention teaches the invention of claim 23 and further, Pires teaches sweeteners may be added (0030) however Pires fails to teach the invention further comprising 10-25% of the sweetener sugar.

Leshik teaches sweeteners such as sucrose (table sugar) (column 1, line 67) may be used in a similar whippable composition in amounts of 0.05-40% by weight (column 3, line 28, in table). It would have been obvious to one having ordinary skill in the art to use the sweetener of Leshik in the specified amounts with the invention of Pires since this would add a sweet flavor to the emulsion of Pires.

**Claims 29 rejected under 35 U.S.C. 103(a) as being unpatentable over Murillo Hadad Pires, US-PG Pub 2002/0119238 in view of Proceedings of World Conference on Lauric oils NPL as evidenced by Jim Doucet, US-Patent 5,908,655 and Khalil M. Moussa, US-Patent 6,833,231.**

**Regarding claim 29**, the composite invention teaches the invention of claim 28, and in particular, Pires teaches using electric domestic mixers (such as Hobart or Kitchenaid) (0046) however Pires fails to teach whipping with a Kenwood Major Classic

wherein the whipping is done at speed 1 to 2 during 30 seconds to 2 minutes, then at speed 3 to 5 until optimal consistency is reached.

Referring to the claimed mixing times, Pires teaches a total mixing time of 2-4 (which falls within the range of the total time of the claim) minutes when using a Hobart type at maximum speed (0046) but doesn't teach the mixing in the manner claimed by applicant however one of ordinary skill in the art would have recognized the effects of adjusting the speeds depending on the kind of features desired (and the particular mixing device) and also mixing at various speeds over more than one step would have allowed for more control over the physical appearance of the mixed product and thus it is considered that in light of the teaching of Pires, one of ordinary skill would have found the claimed whipping parameters obvious and discoverable through routine experimentation.

Referring to Kenwood Major classic, this mixer is commonly used in many kinds of mixing processes such as food mixing as well as the mixing of other materials (see column 13, line 11). It would have been obvious to one having ordinary skill in the art to select a Kenwood Major classic mixer as the particular electric mixer of Pires since the Kenwood Major classic mixer is very popular and has a reputation of being a reliable mixing device.

**Claim 39 rejected under 35 U.S.C. 103(a) as being unpatentable over Murllo Hadad Pires, US-PG Pub 2002/0119238 in view of Proceedings of World Conference on Lauric oils NPL, Fatty acid composition NPL, and Mark D.**

**Freeman, US-PG Pub 2003/0026890 as evidenced by Jim Doucet, US-Patent 5,908,655.**

**Regarding claims 39**, the composite invention teaches the invention of claim 23 however it is unclear if the fatty acid profile of the hydrogenated palm kernel oil would be the same as that of claim 39.

Fatty acid composition NPL teaches that Palm Kernel oil (non-hydrogenated) has a fatty acid content that substantially overlaps the C10, C12, and C14 of the claim (hydrogenation would dramatically increase the C18 content). Additionally Freeman teaches that triglycerols derived from hydrogenated palm kernel oils have fatty acid contents from 10-20% C16 and C18, at least 50% C12, and 15% or greater C14 (0021) (C8 may be in an amount of 2.1% in one embodiment, see 0043). In light of these teachings, it would have been obvious to one having ordinary skill in the art to adjust the compositional amounts of the fatty acid profiles in order to achieve the most desired effects provided by the oil (for example adjusting the C8 content would affect the antibacterial properties of the oil and adjusting the C18 content would affect the "hardness" of the oil).

**Claim 40 rejected under 35 U.S.C. 103(a) as being unpatentable over Murillo Hadad Pires, US-PG Pub 2002/0119238 in view of Proceedings of World Conference on Lauric oils NPL as evidenced by Jim Doucet, US-Patent 5,908,655 and Shantha C. Nalur, US-Patent 5,932,275.**



**Regarding claim 40**, the solid fat content profile would naturally decrease as the temperature is increased. Additionally, as evidenced by Nalur, Palm Kernel oil products typically have a profile that is substantially close to applicant's (see column 5, lines 55-65 of Nalur). Since the product of the composite invention is substantially the same as applicant's invention of claim 23, it is considered that the fat profile would be substantially the same as applicant's. Additionally, it would have been obvious to one having ordinary skill in the art to adjust various components of the invention in order to produce desired effects which would result in a slight change of the profile of the composite invention and thus it is considered that applicant's claimed range would have been discoverable through routine experimentation.

**Claim 42 rejected under 35 U.S.C. 103(a) as being unpatentable over Murllo Hadad Pires, US-PGPub 2002/0119238 in view of Proceedings of World Conference on Lauric oils NPL as evidenced by Jim Doucet, US-Patent 5,908,655 and Manmohan H. Desai, US-Patent 6,638,556.**

**Regarding claim 42**, the composite invention teaches the invention of claim 23 and further, Pires teaches that the volume may increase (overrun, column 1, lines 43-44 of Desai) by 250-300% after whipping (0046).

***Response to Arguments***

Applicant's arguments filed 3/24/2009 have been considered but are moot in view of the new ground(s) of rejection.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to **PRESTON SMITH** whose telephone number is (571)270-7084. The examiner can normally be reached on Mon-Th 6:00-4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rena Dye can be reached on (571)272-3186. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Drew E Becker/  
Primary Examiner, Art Unit 1794

prs